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8 Christopher P. Burke

Eng 6/22/23

9 UNITED STATES BANKRUPTCY COURT

10 DISTRICT OF NEVADA

11 oOo

12 BK-N- 20-50660-GS

13 CHAPTER 7

14 IN RE

15 Hearing Date: 6/26/23

16 and Time: 9:30

17 Mtn No. \_\_\_\_\_

18 METAL RECOVERY SOLUTIONS,  
19 INC., aka MRS, INC,

20 Debtor(s).  
21 \_\_\_\_\_/

22 OPPOSITION TO GEO-LOGIC  
23 ASSOCIATES' MOTION TO COMPEL  
24 COMPLIANCE WITH SALE ORDER  
25 (ECF 330)

26 Chapter 7 Trustee, Christopher P. Burke, by and through his  
27 counsel, Michael Lehnors, Esq. files the following Opposition to Geo-Logic  
28 Associates' Motion to Compel Compliance With Sale Order (ECF 330).

1 **Background**

This motion concerns this Court's May 5, 2023 Order Approving  
Trustee's Motion to Approve Sale of Claims and Other Bankruptcy estate  
Assets (ECF 317). Element Global Inc (referred to as Element) was the  
high bidder with a cash offer of \$2,500,000. JEX Technologies Corp.,  
(referred to as Jex) and Dr. Seal reserved a collective backup bid of  
\$2,450,000. Element was obligated to pay this sum on or before May 26,  
2023.

1 Element requested a brief extension from May 26 to June 5, 2023.  
 2 The Trustee consented to this short extension on the express condition  
 3 that both Jex and Dr. Seal consent to be bound to pay their collective  
 4 backup bid of \$2,450,000 should Element fail to pay by June 5, 2023.  
 5 This consent was placed in writing and signed by the respective  
 6 attorneys for Element, Jex and Dr. Seal.

7 On or about June 5, 2023 Element sought a second extension, this  
 8 time to June 30, 2023. The Trustee agreed on three conditions: (1)  
 9 Element will immediately pay \$50,000 to the Trustee which will be  
 10 applied to the purchase price; (2) This \$50,000 is non-refundable should  
 11 Element not pay the balance on June 30, 2023; and (3) Jex and Dr. Seal  
 12 shall consent in writing to be bound to pay their collective backup bid of  
 13 \$2,450,000 should Element fail to pay by June 30, 2023.

14 All three conditions were satisfied, and on June 7, 2023 the  
 15 Trustee filed notice of this conditional extension with supporting  
 16 documentation (ECF 328).

## 17 **2. Claims and Assets**

18 The claims of Differential Engineering have been disallowed. There  
 19 are three remaining allowed unsecured claims in this case which total  
 20 2,278,390.55:

21	Guild, Gallagher & Fuller -----	\$1,500.00
22	Geo-Logic Associates -----	\$2,215,692.69
23	Brownstein Hyatt Farber, Schreck-----	\$61,197.86
24	Total-----	\$2,278,390.55

25 In addition to the \$2,500,000 bid, the Trustee had previously  
 26 recovered \$163,464.84 as a settlement in the adversary proceeding  
 27 entitled *Burke vs. Geo-Logic Associates*, Adv. No. 20-5025. A stipulation  
 28 was entered on December 14, 2020 (Adv. ECF 18); and an order

1 approving the stipulation was entered on December 15, 2020 (Adv. ECF  
2 19).

3 The estate is fully solvent, and the unsecured claims shall bear  
4 interest at the appropriate rate.

### 5 **3. Trustee's Business Judgment**

6 The Chapter 7 Trustee is a fiduciary charged with protecting the  
7 interest of all estate beneficiaries - namely, all classes of creditors as  
8 well as the debtor's interest in exemptions and in any surplus property.  
9 *In re Wisdom*, 478 B.R. 394, 399 (Bankr. D. Idaho 2012), *aff'd*, 490 B.R.  
10 412 (D. Idaho 2013), *aff'd sub nom. Wisdom v. Gugino*, 649 F. App'x 583  
11 (9th Cir. 2016), citing the United States Trustee, Handbook for Chapter 7  
12 Trustees (Effective October 1, 2012), pg. 4-2

13 The Trustee's measure of care and diligence is one that an ordinary  
14 prudent person would exercise under similar circumstances. *In re*  
15 *Rigden*, 795 F.2d 727, 730-31 (9th Cir. 1986).

16 Ordinarily, the position of the trustee is afforded deference,  
17 particularly where business judgment is entailed in the analysis or  
18 where there is no objection. Nevertheless, particularly in the face of  
19 opposition by creditors, the requirement of court approval means that  
20 the responsibility ultimately is the court's. *In re Lahijani*, 325 B.R. 282,  
21 289 (B.A.P. 9th Cir. 2005).

22 In this case, there will be a surplus after all creditors are paid,  
23 including anticipated administrative claims. The Trustee is under a  
24 fiduciary duty to protect the Debtor's interest in surplus property.

25 The Trustee supports his June 30, 2023 extension for the following  
26 reasons. The Trustee believes Element is contractually bound to pay for  
27 the assets and claims it purchased. If the Trustee made demand on Jex  
28

1 and Dr. Seal, the estate would have received \$50,000 less, and the  
2 Trustee would have the obligation to pursue Element for the \$50,000  
3 difference. That would have reduced the surplus by the administrative  
4 costs spent to recover the \$50,000.

5 By obtaining the extension (and the \$50,000 certified check), the  
6 Estate will recover \$2,500,000 even if Element fails to pay on June 30,  
7 2023. Should that happen, the Trustee will make demand upon Jex and  
8 Dr. Seal. They will pay the \$2,450,000 and the Trustee will be entitled to  
9 keep the \$50,000. This insures the benefit of the bargain will be  
10 retained whether Element is able to meet the deadline or not.

11 Last, the Trustee would not have agreed to the extension unless  
12 both Jex and Dr. Seal agreed to be bound by their backup bid at the time  
13 the extension expires should Element not pay. This agreement was  
14 obtained in writing, and it is signed by each party's respective attorney.

15 The Trustee believes these reasons supports his business  
16 judgment.

#### 17 **4. Argument**

##### 18 **A. GEO LOGIC'S POSITION**

19 Geo Logic is understandably concerned about the length and  
20 expense of its case against the Debtor. There have been years of  
21 litigation. Geo Logic argues the Trustee unilaterally may not give an  
22 extension because it is a modification of an order. Nothing was filed to  
23 modify the order. i.e. a motion under Fed. R. Bank. Pro. 9006(b)(1).

24 Geo Logic also argues that it holds 97% of the claims, and the duty  
25 to it is superior to shareholders, citing *In re Original IFPC Shareholders,*  
26 *Inc.* 317 B.R. 738 (Bkrctcy N.D. Ill 2004). The Court made this distinction  
27  
28

1 as a result of the different legal rights that creditors and equity security  
2 holders have under the Bankruptcy Code.

3 This argument overlooks one significant point. A debtor is a person  
4 or municipality concerning which a case under this title has been  
5 commenced 11 U.S.C. §101(13). An equity security holder means holder  
6 of an equity security of the debtor 11 U.S.C. §101(17). The terms are not  
7 synonymous.

8 *In re Wisdom*, supra, is clear. Under the United States Trustee  
9 Handbook for Chapter 7 Trustees, the Trustee is charged with protecting  
10 the debtor's interest in any surplus property. This obligation can not be  
11 ignored because the debtor's equity security holders may subsequently  
12 benefit from this duty. The duty is to the surplus property; not the  
13 equity security holders.

14 Fed. R. Bank. Pro. 9006 does authorize motions to extend time  
15 under certain circumstances. However, the request must be made before  
16 the expiration of the period originally prescribed or as extended by a  
17 previous order (emphasis supplied).

18 That was not possible here. The extension from May 26, 2023 to  
19 June 5, 2023 was sought on May 26, 2023. The extension from June 5,  
20 2023 was sought on June 5, 2023. No motion could have been filed or  
21 granted due to this timing.

22 B. GEO LOGIC HAS NOT DEMONSTRATED IT SUFFERED  
23 CONCRETE HARM

24 The irreducible constitutional minimum of standing contains three  
25 elements. First, the plaintiff must have suffered an injury in fact — an  
26 invasion of a legally protected interest which is (a) concrete and  
27 particularized. Second, there must be a causal connection between the  
28

1 injury and the conduct complained of — the injury has to be fairly ...  
2 traceable to the challenged action of the defendant, and not the result of  
3 the independent action of some third party not before the court. Third, it  
4 must be likely, as opposed to merely speculative, that the injury will be  
5 “redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S.  
6 555, 560–61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). The injury  
7 must also be actual or imminent, not conjectural or ‘hypothetical. *Id.* See  
8 also *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 194 L. Ed. 2d  
9 635 (2016), *as revised* (May 24, 2016).

10 Abstract injury is not enough. The plaintiff must show that he has  
11 sustained or is immediately in danger of sustaining some direct injury as  
12 the result of the challenged official conduct and the injury or threat of  
13 injury must be both real and immediate, not conjectural or hypothetical.  
14 *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02, 103 S. Ct. 1660, 1665,  
15 75 L. Ed. 2d 675 (1983).

16 In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, (2021) the Court  
17 said “Article III grants federal courts the power to redress harms that  
18 defendants cause plaintiffs, [it is] not a freewheeling power to hold  
19 defendants accountable for legal infractions.” *Id.* 141 S. Ct. at 2205.

20 The harm complained of by Geo Logic is not concrete. It is  
21 hypothetical and speculative. There are more than ample assets in this  
22 case to pay Geo Logic (and the other two creditors) in full with interest.  
23 Interest is the time value of money. The delay is short, but the \$50,000  
24 benefit is significant. For that reason, any alleged procedural infraction is  
25 harmless.  
26  
27  
28

1       **5. Conclusion**

2           The Trustee does not owe any duty to Dr. Seal. Rather, he does owe  
3       a duty to protect Metal Recovery Solutions, Inc's interest in any surplus  
4       property. Debtors and shareholders are defined differently under 11  
5       U.S.C. §101. The shareholder analysis is not relevant for that reason.

6           Before giving Element either extension, the Trustee secured in  
7       writing Jex and Dr. Seal's commitment to pay the \$2,450,000 should  
8       Element default. The second time, the Trustee received \$50,000 which is  
9       non-refundable in the event of a default.

10          A trustee must sometimes take immediate action to protect the  
11       estate. That was the case here. The trustee's actions insure the estate  
12       will receive \$2,500,000 if Element does not pay and Jex and Dr. Seal do.  
13       Geo Logic has not suffered any concrete harm.

14          That being said, this will be the last extension given to Element. If  
15       it fails to pay on Friday, June 30, 2023; a notice of default and demand  
16       will be sent to Jex and Dr. Seal on Monday, July 3, 2023. For these  
17       reasons, the motion to compel should be denied.

18  
19  
20           Dated: This 21 day of June, 2023

21  
22           By: 

23           Michael Lehnert, Esq.  
24           429 Marsh Ave.  
25           Reno, Nevada 89509  
26           Nevada Bar Number 003331  
27  
28

**CERTIFICATE OF SERVICE BY MAIL**

Pursuant to Federal Rule of Civil Procedure 5(b), I certify that on the 22 day of June, 2023 I deposited for mailing in the United States Post Office in Reno, Nevada, with postage thereon fully prepaid, a true copy of the within **OPPOSITION TO GEO-LOGIC ASSOCIATES' MOTION TO COMPEL COMPLIANCE WITH SALE ORDER (ECF 330)** addressed as follows:

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In addition a copy of the attached document was served to all registered participants in this case through the court's ECF system upon filing.

  
Dolores Stigall